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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERVENORS-RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court below is reported at 270 F. 2d 914 (Pet. App. A1).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on October 1, 1959. Mr. Justice Black entered two orders, December 31, 1959, and January 21, 1960, extending the time for petitioner to file its petition for certiorari until February 10, 1960. On February 10, 1960, peti-

* Hereinafter referred to as Intervenors.

tioner filed its petition for a writ of certiorari. This Court's jurisdiction is invoked by petitioner under 28 U.S.C. 1254.

STATUTES AND REGULATIONS INVOLVED

The pertinent sections of the Communications Act of 1934, as amended 47 U.S.C. 151 *et seq.*, and the Rules and Regulations of the Federal Communications Commission are set out in the petition (pp. 5-18).

Section 1040 of the Administrative Procedure Act of 1946, as amended, 5 U.S.C. 1001 *et seq.*, is cited in an Appendix to this brief.

THE DECISION BELOW IS CORRECT AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT

A. The Grant of These Applications Did Not Create an Undue Concentration of Control of Mass Media of Communication

This case was initially reversed and remanded by the Court of Appeals to the Federal Communications Commission to allow petitioner here to have a full hearing on the issues it presented for determination. The ultimate question was to determine whether, on the basis of the record, the grants to WHEC and Veterans of their applications to operate on a share-time basis, on Channel 10 at Rochester, New York, were contrary to the public interest, convenience, and necessity. The petitioner at no time objected to the issues as set out by the Commission nor did petitioner request further issues. In its petition for certiorari, petitioner paints an ominous picture of the Gannett enterprise but admits that it is not "a sinister organization" (Pet. 29). Intervenors submit that the Commission made an adequate determination of the effect of granting the share-time applications and that the Court of Appeals in affirming the Commission on this point made a "fair

assessment" of the record *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502; 95 L. Ed. 479, 482 (1951). This Court has many times reiterated the basic premise that the Court of Appeals is the tribunal to determine the "substantiality of evidence on the record."[1]

Intervenors submit that on the basis of the full evidentiary hearing held before the Commission the resulting record afforded the Court of Appeals the opportunity to render the opinion here questioned.[2] It is further submitted that that Court made no misapprehension or gross application of the standard required in reaching such a decision.[3]

B. The Vote of the Commissioners Was Legally Sufficient to Grant the Applications

The question as to the legality of the vote of the Commissioners concerning the grant of the share-time applications was first raised by petitioner in the Court of Appeals when it sought relief in that Court in 1955 *Federal Broadcasting System, Inc.* v. *Federal Communications Commission*, 225 F. 2d 560; 96 U.S. App. D.C. 260 (1955). (Pet. App. A2). The Court at that time stated, at page 564, as follows:

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[1] "* * * substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.'" *Federal Trade Commission* v. *Standard Oil Company*, 355 U.S. 396, 2 L. Ed. 2d 359 (1958), citing *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491, 95 L. Ed. 456, 469 (1951).

[2] In re Applications of *WHEC, Inc. and Veterans Broadcasting Company, Inc.*, 14 Pike and Fischer RR 150; (S.J.A. 103).

[3] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491, 95 L. Ed. 456, 469, (1951).

"Nothing in law or fact authorizes us to reach any other conclusion than that the action in question was taken by majority vote of the Commissioners present and voting."

Following this decision intervenors unsuccessfully petitioned this court for certiorari (*WHEC, Inc. and Veterans Broadcasting Company, Inc.* v. *Federal Broadcasting System, Inc.*, 350 U.S. 923). Although petitioner responded in opposition to intervenors' petition, it did not ask this Court to review the decision.[4] The time to petition this Court for a writ of certiorari in this case is governed by Section 1040 of the Administrative Procedure Act.[5] This section provides for such a writ to be filed within ninety days of entry of final judgment by the Court of Appeals. Intervenors submit that the question of the legality of the vote of the Commissioners is improperly before this Court, having been decided by the Court of Appeals in 1955, and not in the decision here in question. In view of these facts, this Court should not entertain this question *Rust Land & Lumber Company* v. *Ed. Jackson, et al.*, 250 U.S. 71.

Questions three and five, concerning procedures of the Commission, were also decided by the Court of Appeals in 1955. Consequently, these questions do not belong in this petition. Even if these questions were properly before this Court, they present matters so

[4] In addition, petitioner never raised this question before the Commission when the protest was heard by it, nor did it seek a rehearing of the question from the Court of Appeals.

[5] Administrative Procedure Act of 1946, as amended, 60 Stat. 237, 5 U.S.C. 1001 *et seq.*

unique and improbable of ever again being raised that they do not warrant determination by this tribunal.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: March 9, 1960

APPENDIX

Section 1040 of the Administrative Procedure Act of 1946, as amended. 5 U.S.C. 1001 et seq.:

Section 1040. Review in Supreme Court on certiorari or certification:

An order granting or denying an interlocutory injunction under section 1039(b) of this title shall be subject to review by the Supreme Court of the United States upon writ of certiorari as provided in section 1254(1) of Title 28: *Provided*, That application therefor be duly made within forty-five days after the entry of such order. The final judgment of the court of appeals in a proceeding to review under this chapter shall be subject to review by the Supreme Court of the United States upon a writ of certiorari in accordance with the provisions of section 1254(1) of Title 28: *Provided further*, That application therefor be duly made within ninety days after the entry of such judgment. Either the United States or the agency or an aggrieved party may file such petition for a writ of certiorari. The provisions of section 1254(3) of Title 28, regarding certification, and of section 2101(e) of Title 28, regarding stays, shall also apply to proceedings under this chapter.